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Supreme Court, U.S.
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No. 98-1240

In The

Supreme Court of the United States

October Term, 1998

JOHN DAVID LOVELACE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER PETITIONER PROPERLY WAS SEARCHED INCIDENT TO HIS ARREST FOR POSSESSION OF AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT 3

CERTIORARI IS NOT WARRANTED BECAUSE THE DECISION BELOW IS NOT INCONSISTENT WITH *KNOWLES V. IOWA* 3

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Adams v. Williams, 407 U.S. 143 (1972) 6

Knowles v. Iowa, ___ U.S. ___, 119 S. Ct. 484 (1998) ..... *passim*

Lovelace v. Commonwealth, 27 Va. App. 575, 500 S.E.2d 267 (1998) 1, 9

Minnesota v. Dickerson, 508 U.S. 366 (1993) 6

Rhodes v. Commonwealth, 28 Va.App. 296, 504 S.E.2d 290 (1998) 8

Terry v. Ohio, 392 U.S. 1 (1968) 6

United States v. Brown, 913 F.2d 570 (8th Cir.), *cert. denied*, 498 U.S. 1016 (1990) 7

United States v. Cutchin, 956 F.2d 1216 (D.C. Cir. 1992) 7

United States v. Holifield, 956 F.2d 665 (7th Cir. 1992) 6

United States v. Lender, 985 F.2d 151 (4th Cir. 1993) 7

United States v. Michelletti, 13 F.3d 838 (5th Cir.), *cert. denied* 513 U.S. 829 (1994) 7

United States v. Robinson, 119 F.3d 663 (8th Cir. 1997) 7

United States v. Swann, 149 F.3d 271 (4th Cir. 1998) 7

Washington v. Chrisman, 455 U.S. 1 (1982) 6

OTHER AUTHORITIES

Section 19.2-74, Code of Virginia 4

Wayne R. LaFave, *Search and Seizure* (3d ed. 1996) ... 6, 8

OPINION BELOW

The opinion of the Virginia Court of Appeals is reported as *Lovelace v. Commonwealth*, 27 Va. App. 575, 500 S.E.2d 267 (1998). The order of the Supreme Court of Virginia *refusing Lovelace's appeal* is found in the petitioner's appendix at page 11.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are recited in Lovelace's petition at 2 and A13-15.

STATEMENT OF THE CASE

The petitioner was convicted in a bench trial in the Circuit Court of Halifax County, Virginia, of possession of marijuana and possession of cocaine with intent to distribute. On April 24, 1997, he was sentenced to 30 days incarceration for the marijuana conviction and to five years imprisonment with four years suspended, for the cocaine conviction. (App. 8-9).

The Virginia Court of Appeals affirmed the petitioner's convictions on June 16, 1998. *Lovelace v. Commonwealth*, 27 Va. App. 575, 500 S.E.2d 267 (1998). (App. 1-7). The Virginia Supreme Court refused his petition for appeal on October 5, 1998 (App. 11) and denied a petition for rehearing on November 6, 1998. (App. 10).

STATEMENT OF FACTS

The facts surrounding the petitioner's conviction are set forth in the opinion of the Court of Appeals of Virginia as follows:

> At about 10:00 p.m. on August 23, 1996, Halifax County Deputies Sweeny and Womack saw appellant standing near a convenience store in an area "known as an open air drug market." He was drinking from a green glass bottle. Deputy Sweeny believed the bottle contained beer, and he told appellant to drop the bottle and lie face down on the ground. "Several other officers converged on the lot at the same time." "Due to the number of people on the lot," Officer Womack thought it was in the officers' best interest "to put these subjects down on the ground so we could handle the situation if somebody wanted to act up." Womack testified that appellant was being detained because of the open container of beer.
>
> When Womack told appellant to drop the bottle and lie face down on the ground, appellant dropped and broke the bottle. Near appellant's feet, Deputy Womack observed several open bottles of beer and five unopen bottles of beer in a carton. Womack had already seen a bottle hit a car beside appellant as Womack was approaching. Womack smelled the odor of alcohol as he was talking to appellant, although he could not say whether the odor was coming from appellant or from the bottle that had been broken nearby. The bottle which hit the car came from the area where appellant was standing, but Womack did not see whether appellant threw it.

> Once appellant was on the ground, Womack asked him whether he had any drugs or guns. Appellant did not reply. Womack then patted appellant down and detected "something in his pocket . . . [that] felt like a bag." "During [Womack's] experience [he'd] found drugs before on people, and sometimes they carried it in these kinds of bags. . . . [He] didn't know if it was a plastic bag or what at that time, but [he] felt some lumps and . . . felt it to be squooshy." Womack could not tell what was in the bag; however, he retrieved the bag, which was later determined to contain 2.38 grams of crack cocaine rocks and 2.96 grams of marijuana. He placed appellant under arrest for possession of marijuana and cocaine. In appellant's possession, Womack found a black pouch containing $ 121 and a razor blade. In appellant's pocket, he found $ 171.30, made up mostly of ten- and twenty-dollar bills.

(App. 2-3)

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE DECISION BELOW IS NOT INCONSISTENT WITH *KNOWLES V. IOWA*

The petitioner contends that certiorari should be granted because of alleged inconsistencies between the State court's opinion in this case and *Knowles v. Iowa*, ___ U.S. ___, 119 S. Ct. 484 (1998), which was decided after the State courts had disposed of this case. There are, however, substantial differences between this case and *Knowles*.

In *Knowles*, the Iowa police officer issued a traffic citation to Knowles and then conducted a full search of his vehicle. *Id.* at 486. The Iowa court treated the detention as a noncustodial arrest and upheld the search as a "search incident to citation." *Id.* at 487.

This Court addressed the "historical rationales" for the "search incident to arrest": the need to protect officer safety and to preserve relevant evidence during routine traffic stops. *Id.* at 487. The Court then determined that the search incident to the traffic stop in *Knowles* was improper because there was no basis for either a pat down to disclose weapons or for a search to uncover evidence of the crime. *Id.* at 488. The Court pointed out that no additional evidence of the crime of speeding could be found. *Id.*

Here, as the petitioner concedes (Pet. 10), no citation was ever issued. Virginia, moreover, has not adopted Iowa's theory that a search can be effected incident to a non-custodial arrest; the Virginia courts instead determined that petitioner was in fact in custody at the time of the search. The opinion below pointed to Virginia Code § 19.2-74, which speaks in terms of "release . . . from custody" when a summons has been issued. (App. 6, 14).

Even if this Court were to consider the petitioner's situation equivalent to *Knowles*, both bases for a search identified in *Knowles* were present here. The search was justified both because the petitioner could reasonably be considered armed and dangerous and because a search for evidence of the offense for which the petitioner was in custody might have produced evidence of that offense.

The defendant or one of his companions had thrown at least one bottle which had broken against a car as the police approached. Because the area was an open air drug market and the numerous persons present had displayed hostility to the police by throwing the bottle, the police placed the petitioner and others on the ground. On approaching the petitioner, the officer smelled the odor of alcohol. The petitioner's detention was effected at night, in a high crime area, after the police reasonably suspected that a bottle had been thrown at them by people illegally drinking alcoholic beverages in public.

The petitioner himself admits that the officer, "without making a formal arrest or without expressing any intent to do so at the time he detained Lovelace, had authority to conduct a patdown search of weapons only." (Pet. 10). He then incorrectly states that there is nothing in the officers' testimony to show that they feared for their safety.

To the contrary, the record shows that, " 'due to the number of people on the lot,' Officer Womack thought that it was in the officers' best interest 'to put the subjects down on the ground so we could handle the situation if somebody wanted to act up.' " (App. 2). The Virginia Court of Appeals also stated that "Womack had already seen a bottle hit a car beside appellant as Womack was approaching." (*Id.*). When the petitioner was asked whether he was carrying any drugs or guns, he did not respond. (*Id.*) At that point, the officers were entitled to patdown the petitioner.

The detention clearly was appropriate because the officer had probable cause to believe that the petitioner

had committed a misdemeanor. Under *Terry v. Ohio*, 392 U.S. 1, 24 (1968) " 'when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous the officer or to others' the officer may conduct a patdown search 'to determine whether the person is in fact carrying a weapon.' " *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). A patdown is permitted "to allow the officer to pursue his investigation without fear of violence. . . . " *Adams v. Williams*, 407 U.S. 143, 146 (1972).

Since "[e]very arrest must be presumed to present risk of danger to the arresting officer," *Washington v. Chrisman*, 455 U.S. 1, 7 (1982), an arrest of several persons in an open air drug market after potential hostility has been shown reasonably can be considered dangerous. "[T]he policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams*, 407 U.S. at 147.

To justify a frisk the government need establish "only that there was a substantial possibility that the suspect possessed items which could be used for an attack and that he would so use them." LaFave, *Search and Seizure*, § 9.5(h) 253 (3d ed. 1996). Even the already observed possession of bottles constituted a potential threat to the officers here because the individuals being detained may already have used a bottle as a weapon.

The federal circuit courts thus have authorized patdowns where the suspect displayed a "boisterous aggressive approach" to officers and had just exited a tavern. *United States v. Holifield*, 956 F.2d 665, 667 (7th Cir. 1992); where a suspect makes a rapid movement towards a

police officer; *United States v. Cutchin*, 956 F.2d 1216, 1218 (D.C. Cir. 1992); or where a suspect displays a threatening demeanor towards the police. *United States v. Swann*, 149 F.3d 271, 274 (4th Cir. 1998).

In *United States v. Michelletti*, 13 F.3d 838 (5th Cir.), *cert. denied*, 513 U.S. 829 (1994), the court found the patdown justified because "Michelletti, a large and imposing man, was heading straight towards [the officer] with a 'cocky,' perhaps defiant attitude and his right hand concealed precisely where a weapon could be located." *Id.* at 842. The court stressed the fact that the man was leaving a bar with an open bottle of beer in his hand and that there were a number of other people in the area. *Id.* at 842-43.

Here, additionally, the defendant and the others were in an open air drug market. The courts have recognized that suspicion of being involved in drug activity carries with it a suspicion that one may be armed because "weapons and violence are frequently associated with drug transactions." *United States v. Brown*, 913 F.2d 570, 572 (8th Cir.), *cert. denied*, 498 U.S. 1016 (1990); *see also United States v. Robinson*, 119 F.3d 663, 667 (8th Cir. 1997). "[A]n area's propensity toward criminal activity is something that an officer may consider." *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993).[1]

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[1] Although it is true, as the petitioner points out, that the Commonwealth did not seek to establish reasonable suspicion that Lovelace was armed and dangerous, there was no reason for the Commonwealth to do so since the petitioner did not contest the availability of the patdown. Instead he argued that probable cause for the arrest did not exist and that, even if it did, such arrest would not support the search. (App. 3).

Also unlike *Knowles*, a search for evidence was warranted here because, upon being approached by the police, Lovelace had thrown away or broken the bottle he had been holding. Although the officer suspected that the bottle had contained beer, it would have been difficult for him to prove that fact if the bottle with its contents could not be recovered. In order to determine that the substance in the bottle had been alcohol, it was appropriate to search Lovelace to determine whether he had cash register receipts from the nearby convenience store showing a recent purchase of alcoholic beverages.

Thus, this case cannot be characterized, as was *Knowles*, as "a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all." 119 S.Ct. at 488.[2]

Finally, as petitioner points out, this issue still is pending in the Virginia courts. In the case of *Rhodes v. Commonwealth*, 28 Va.App. 296, 504 S.E.2d 290 (1998), a

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[2] Even the dissent in *Rhodes* recognized that upon a non-custodial arrest a search is permitted where the factors discussed above are present.

> [A] police officer may not search an individual incident to the issuance of a summons or a citation of an offense which does not carry an active jail sentence unless: (1) the officer has reasonable suspicion that the individual is armed and dangerous, or (2) to search for evidence or instrumentalities of a specific crime for which the officer has probable cause to issue the summons or a citation to make an arrest.

28 Va. App. at 303-04, 504 S.E.2d at 393, quoting Wayne R. LaFave, *Search and Seizure*, § 5.2(h) at 96, 99 (3d ed. 1996).

rehearing *en banc* was argued in the Virginia Court of Appeals on March 24, 1999. As the petitioner states in his petition (Pet. 5), the issue in that case is identical to that in his case. The *Rhodes* court, in deciding the case, will have the *Knowles* opinion before it.

The Virginia Supreme Court, moreover, did not have *Knowles* before it when it denied the petition for appeal in this case. If the courts were to change their position in *Rhodes* and reject the decision in *Lovelace*, there would be no point in this Court addressing the same issue. On the other hand, if the Virginia courts should reach a decision similar to that they have previously reached, they would do so on the basis of *Knowles* and so present to this Court a better record on which to determine whether Virginia had appropriately interpreted applicable federal law. It is premature, therefore, to grant certiorari before the Virginia courts have had an opportunity to consider and apply *Knowles*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Respondent herein

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